

B & J EXCAVATING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-239

Decided September 30, 1985

Appeal from a decision of Administrative Law Judge David Torbett (NX 5-25-R) granting temporary relief from Cessation Order No. 84-91-161-002.

Vacated and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Generally

Pursuant to sec. 525(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(c) (1982), an applicant for temporary relief from a cessation order or a notice of violation must show "that there is substantial likelihood that the findings of the Secretary will be favorable to him" and that "such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources."

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

As of Apr. 30, 1984, officials of OSM were authorized, pursuant to sec. 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254 (1982), to directly enforce the inspection and enforcement provisions of the approved State of Tennessee permanent regulatory program. 49 FR 15496 (Apr. 18, 1984). Notwithstanding that the State subsequently repealed its

surface mining law and implementing regulations effective Oct. 1, 1984, it was proper for OSM under its enforcement authority to issue a notice of violation prior thereto for a recognized violation of the State program. When abatement of the violation did not occur within the period of time prescribed in the notice of violation, OSM was not only authorized but obligated to issue a cessation order for this failure. The cessation order was not invalid because it was issued after Oct. 1, 1984.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Generally--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

Temporary relief cannot be granted where no evidence has been presented that one of the essential conditions has been met for obtaining such relief.

APPEARANCES: R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Charles A. Wagner III, Esq., Knoxville, Tennessee, for B & J Excavating Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed the December 3, 1984, decision of Administrative Law Judge David Torbett (Hearings Division Docket No. NX 5-25-R) granting temporary relief from Cessation Order No. 84-91-161-002, issued to B & J Excavating Company (B & J) for failure to abate Notice of Violation (NOV) No. 84-91-161-007.

On September 21, 1984, OSM Inspector Edwin M. Atkins issued this notice of violation to B & J for failure to completely eliminate the highwall in its surface mining operation known as Area No. 2. The notice of violation cited the provisions of the Tennessee program requiring backfilling and grading and elimination of highwalls. Tennessee Administrative Compilations (TAC) No. 0400-1-14-.57. The required corrective action specified in the notice was to take necessary measures to completely eliminate the highwall as agreed upon in B & J's permit conditions, including backfilling and grading to achieve approximate original contour, and establishing vegetation according to revegetation plans. The time for abatement was 30 days, expiring on October 19, 1984, at 8 a.m.

On October 24, 1984, after reinspecting the site, Inspector Atkins issued, by mail, the cessation order to B & J, citing its failure to abate the highwall. The order noted that the operation was in reclamation status.

B & J's Area No. 2 is located in Claiborne County, Tennessee, in an area that has been mined previously. This previous mining left a highwall ranging in height from 35 to 45 feet at various "cuts" along the coal seam (Exh. A-4; Tr. 62). B & J commenced remining operations there in 1982, and the last work on the site was done in the summer of 1984. Its mining permit required the elimination of highwalls at the site (Tr. 36, 95-96). During its remining operations, B & J greatly enlarged the preexisting highwall, creating a new highwall ranging from 75 to 100 feet at the various cuts (Exh. A-4). Subsequently, it partially reclaimed the area, but left portions of the enlarged highwall at several of the cuts (Exhs. R-4 to R-31; Tr. 23, 28-34, 66, 69, 76-77, 82).

B & J discovered within 2 months of commencement of remining the site that it would be unable to eliminate the highwall at the site (Tr. 101). According to B & J, upon making the discovery, it initiated negotiations with the Tennessee surface mining authorities in an attempt to obtain a variance from the requirement of having to completely eliminate the highwall on this previously mined site, but, at the time, such a variance was not possible under the applicable state law of Tennessee. Reply Brief at 2.

On November 9, 1984, after the issuance of the cessation order, and after promulgation of a federal program for Tennessee (see below), B & J wrote to OSM in Knoxville, Tennessee, to propose a revision to the backfilling and grading plan for Area No. 2 under 30 CFR 816.106, because there was insufficient spoil to completely eliminate the highwall (Exh. A-3). Also on November 9, B & J wrote to OSM in Norris, Tennessee, describing the difficulties it faced in attempting to eliminate the highwall, and requesting that it be given additional time to abate the condition, so that OSM could rule on its request for a permit revision (Exh. A-2).

Also on November 9, 1984, B & J filed an application for review of the cessation order, along with an application for temporary relief from its terms. On November 19, 1984, a hearing was held before Administrative Law Judge Torbett on the application for temporary relief. On December 3, 1984, Judge Torbett issued his decision granting temporary relief. No ruling was made on the application for review.

In 1980, the State of Tennessee (the State) enacted the Tennessee Coal Surface Mining Law of 1980 (TCSML), Tenn. Code Ann. §§ 59-8-301 through 59-8-339. On August 3, 1982, the Department granted conditional approval of the State's permanent regulatory surface mining program, effective August 10, 1982, pursuant to section 503 of SMCRA, 30 U.S.C. § 1253 (1982). 47 FR 34724, 34753 (Aug. 10, 1982). See 30 CFR Part 942 (1982).

However, the State subsequently failed to adequately indicate to OSM's satisfaction its intent and capability to implement, maintain, and enforce its regulatory program. Consequently, on April 5, 1984, the Department, through the Under Secretary, assumed direct Federal enforcement of the inspection and enforcement portions of the State's program pursuant to 30 CFR 733.12. 49 FR 15496 (Apr. 18, 1984).

In connection with this action the Department enacted rulemaking, effective April 30, 1984, providing that OSM would directly implement, administer, and enforce specified provisions of the previously approved Tennessee regulatory program. Under new regulation 30 CFR 942.17(a) (49 FR 15505 (Apr. 18, 1984)), OSM became responsible for conducting all inspections of surface coal mining and reclamation operations on non-Indian and non-Federal lands within the State, and for issuing notices of violation and cessation orders. On May 18, 1984, OSM published the provisions of the TCSML and the regulations containing Tennessee program requirements that OSM would enforce, including TAC 0400-1-14-.57. 49 FR 21140, 21196.

On May 16, 1984, the State repealed its surface mining law and implementing regulations, effective October 1, 1984, leaving virtually no state program in place after that date. Accordingly, on September 25, 1984, the Department withdrew approval of the State's permanent regulatory program in full, effective October 1, 1984, and, invoking the provisions of section 504(a) of SMCRA, supra, designated OSM as the surface mining regulatory authority in Tennessee. As of October 1, OSM began enforcing the provisions of the permanent program performance standards set forth in 30 CFR Part 816 that replaced those repealed by the State. 30 CFR 942.816(a) (49 FR 38874, 38895 (Oct. 1, 1984)). One of these provisions, 30 CFR 816.106, provides that

[r]emining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §§ 816.102 through 816.107 * * * except * *

(a) The requirements of § 816.102(a)(1) and (2) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall." [1/]

1/ 30 CFR 816.106 provides in full:

"§ 816.106 Backfilling and grading: Previously mined areas.

"Remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §§ 816.102 through 816.107 of this chapter, except as provided in this section.

"(a) The requirements of § 816.102(a)(1) and (2) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the regulatory authority to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

"(1) All spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area.

No similar provision was contained in the Tennessee permanent regulatory program that OSM was enforcing until October 1, 1984.

The Administrative Law Judge's decision observed that when the NOV was issued by OSM in September 1984 "the only remedial action that could be ordered by [OSM] was to completely reclaim the highwall," but that when the cessation order was issued in October 1984 "a variance could be granted by [OSM] to allow certain previously existing highwalls to go partially unreclaimed" (Decision at 2). Although the decision expressed no opinion on whether B & J would be entitled to such a variance, it did state that "it would appear that the judgement as to whether or not a variance should be granted should be rendered by the regulatory authority before [B & J] is required to do something which may or may not be proper." (Decision at 3). The decision concluded:

A hearing has been held with due notice to interested parties in the vicinity of the mine, and there is no likelihood that temporary relief will adversely affect the health and safety of the public or cause significant environmental harm to land, air or water resources. As to the other criteria needed to be shown to grant temporary relief, it is the opinion of the undersigned that even though the notice of violation was properly issued, the abatement procedure ordered by the Respondent [OSM] is now potentially incorrect. Based on the evidence presently contained in the record, the preponderance of the proof shows that the abatement procedure is, in fact, incorrect. Therefore, the undersigned

fn. 1 (continued)

"(2) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and longterm stability.

"(3) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate to the satisfaction of the regulatory authority, that the highwall remnant is stable.

"(4) Spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

"(b) the requirements of § 816.102(a)(1) and (2) requiring the elimination of highwalls shall not apply to remining operations that will not cause an adverse physical impact on the preexisting highwall. Such remining operations shall comply with the following:

"(1) The backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and longterm stability.

"(2) Any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment."

Subsection (b) of 30 CFR 816.106 was suspended on Jan. 3, 1985 (50 FR 257), and proposed for deletion on June 13, 1985 (50 FR 24880).

finds that based on the record as it now exists, there is a substantial likelihood that the findings of the undersigned will ultimately be favorable to the Applicant in this case.

[1] As indicated at the conclusion of the Administrative Law Judge's decision, an applicant for temporary relief must show that "there is substantial likelihood that the findings of the Secretary will be favorable to him" and that "such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources." 30 U.S.C. § 1275(c)(2) and (3); Shamrock Coal Co., Inc. v. Office of Surface Mining Reclamation and Enforcement, 81 IBLA 374, 376 (1984), appeal pending, Shamrock Coal Co. v. Clark, E.D. Kentucky, Civ. No. 84-238, filed July 27, 1984. 2/

[2] On the question of whether there is a substantial likelihood that the findings of the Secretary will be favorable to it, B & J argues that because the Tennessee regulation cited in the September notice of violation was repealed October 1, 1984, the cessation order issued after that date was "defective" because B & J "could not be required * * * to abate a violation of a repealed and therefore non-existent regulation" (Reply Brief at 6). It also argues that it presented evidence that a variance under 30 CFR 816.106 was appropriate, that OSM did not oppose this evidence, and that it would be inequitable to allow enforcement of the notice of violation before its application for a variance could be responded to by OSM (Reply Brief at 5).

The repeal of the Tennessee regulation does not invalidate either the notice of violation or the cessation order. As set forth above, enforcement

2/ Before temporary relief may be granted, it is also necessary that "a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard." 30 U.S.C. § 1275(c)(1) (1982).

Congressional committee statements concerning temporary relief indicate that it was intended to be available only when all conditions were carefully reviewed and met: "Pending review the order or notice complained of will remain in effect, except that in narrowly prescribed circumstances temporary relief may be granted from a notice or order issued under section 521(a)(3). In no case, however, will temporary relief be granted if the health or safety of the public will be adversely affected or if significant, imminent environmental harm will be caused. This provision will ensure that the mining reclamation performance standards will continue to protect the public health and safety or the environment during any administrative proceeding in which their validity is challenged, until the issue is determined on the merits." H.R. Rep. 94-896, 94th Cong., 2d Sess. 79 (1976); Senate Rep. No. 28, 94th Cong., 1st Sess. 183 (1975).

Federal courts have construed the similar language of section 526, 30 U.S.C. § 1276(c) (1982), as requiring that each condition set forth be complied with before temporary relief may be granted from orders of the Secretary. See, e.g., Virginia Surface Mining and Reclamation Association, Inc. v. Andrus, 604 F.2d 312 (4th Cir. 1979).

by OSM of provisions of Tennessee law began April 30, 1984. 30 U.S.C. § 1254 (1982); 30 CFR 942.17. A violation of one of those provisions properly resulted in the issuance of a notice of violation. 30 CFR 843.12(a)(1). When it was not complied with, OSM was not only authorized but obligated to issue a cessation order for failure to abate the violation within the abatement period fixed in the notice of violation. 30 CFR 843.11(b)(1). OSM acted under authority of and in accordance with Federal law and regulations; repeal of the State regulation could neither prevent nor vitiate its action.

Nor can B & J's argument prevail that it should be granted temporary relief because it may yet be able to obtain a variance. From 2 months after it commenced its mining operations until after it completed them, when the notice of violation was issued, B & J was in violation of the Tennessee regulation, the then-governing law. Even had 30 CFR 816.106 been the applicable law during that time, B & J could not argue its entitlement to a variance as a defense to the enforcement action because it has been consistently held that an operator must obtain a variance before engaging in conduct that would otherwise violate surface mining regulations. Hardy Able Coal Co., 2 IBSMA 270, 87 I.D. 434 (1980); Carbon Fuel Co., 1 IBSMA 253, 86 I.D. 483 (1979); Alabama By-Products Corp., 1 IBSMA 239, 86 I.D. 446 (1979). ^{3/}

[3] Although the Administrative Law Judge's decision stated that "there is no likelihood that temporary relief will adversely affect the health and safety of the public or cause significant, imminent environmental harm to land, air or water resources," and OSM does not contest this statement (Brief at 5), there is no evidence in the record to support it. Temporary relief cannot be granted where no evidence has been presented that one of the essential conditions has been met for obtaining such relief. Fetterolf Mining Sales, Inc., 4 IBSMA 29 (1982); Mauersberg Coal Co., 2 IBSMA 63, 87 I.D. 176 (1980); see Virginia Surface Mining & Reclamation Association, Inc. v. Andrus, *supra* at 315.

^{3/} We note that the recent decision in In re Permanent Surface Mining Regulation Litigation, Civ. No. 79-1144 (D.D.C. July 15, 1985), invalidated the Department's regulation at 30 CFR 701.5 (1984) that defined "previously mined lands" to include those previously mined both before and after the surface mining act was enacted. See Slip Op. at 118-22. The Judge found this definition too expansive with regard to its application to 30 CFR 816.106(a) and 30 CFR 817.106(a) (1984) which allow exceptions to the highwall elimination requirements when an operation is re-mining a previously mined area. When the area B & J was re-mining was previously mined is not in the record.

Nor does the record indicate when B & J's permit was issued. If it was not issued under a permanent regulatory program, 30 CFR 816.106 would not apply to B & J in any event: "[o]n and after the effective date of this Federal program, the permanent program performance standards will be applicable only to those surface coal mining operations in Tennessee which have been issued permanent program permits--either by OSM or the State." 49 FR 38877 (Oct. 1, 1984).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated, and the matter is remanded to Administrative Law Judge Torbett for further proceedings consistent with this decision.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

